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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1712~~ 70 - 173

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS ANSWERING RESPONDENTS' REPLY BRIEF OF AUGUST 23, 1971

JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners
Aluminum Company of America,
Crown Central Petroleum Corporation
Lavaca Pipeline Company

Of Counsel:

ROSS N. STERLING
ROBERT E. MORSE, JR.
CHARLES T. NEWTON, JR.
VINSON, ELKINS, SEARLS & SMITH
First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

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Respondents have, in their brief of August 23, 1971, raised new arguments which were not a part of their brief in opposition to the Petition thus necessitating this supplemenal brief in behalf of Petitioners.

I.

This Court Need Not Face Any Question of Constitutional Law in Deciding This Case.

The case at bar presents a situation quite similar to that in *Noerr* where this Court recognized the existence of serious questions whether the conduct there complained of might be protected by the First Amendment but found it unnecessary to consider such questions because of its construction of the Sherman Act. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127, 132 n. 6. That construction of the Sherman Act was that where injury is suffered because of governmental action, the Act simply does not apply even

though falsehood or deception may have been conspiratorily employed to bring about the governmental action which caused the injury. Respondents' repeated assertions that Petitioners stand on claimed First Amendment protection is but a studied effort to avoid the simpler and more basic proposition that the antitrust laws simply do not reach Peitioners' attempts to influence governmental action so that the constitutional question is never reached. Decisions such as those cited by Respondents upholding municipal ordinances regulating commercial activities against claims of First Amendment protection have nothing whatever to do with this Court's proper construction of the Sherman Act.

There is nothing in the decisions in *Noerr, Pennington, Parker* v. *Brown, U.S.* v. *Rock Royal Coop* or *Okefenokee* which limits the doctrine therein announced to situations in which efforts are made to influence policy or changes in rules, regulations or laws as the court below has done. There is nothing in the decisional language or logic of these decisions which excludes administrative or quasi-judicial action. Even if such a limitation was supportable, it is difficult to conceive in what manner the monthly production allowable orders promulgated by the Railroad Commission can be distinguished from any other legislative or quasi-legislative rule or regulation or like action under delegation by state statutory law.

It may be true that one injured by a violation of a Railroad Commission order by another party need not first apply to the Commission for relief before going into court to recover any damages sustained. This proposition and cases supporting it cited by Respondents have nothnig to do with the present controversy. Respondents do not complain of a violation of any Commission Order by Petitioners — they complain that the valid orders of the Commission restricted their production of gas from the Appling Field.

The Texas statutes provide a method for relief in such situations which Respondents have wholly failed to recognize or utilize. Under the terms of Article 6008, Sec. 24, Tex. Rev. Civ. Stat.:

> "Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission . . ." (Appendix, p. 152);

and under Article 6049c, Sec. 8, it is further provided:

> ". . . In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

The plain undisputed facts are that Respondents' gas production was limited only by valid orders of the Texas Railroad Commission acting upon full knowledge and awareness of what was transpiring in the Appling Field. Under the controlling decisions of this Court, the Court of Appeals has greviously erred in applying the Sherman Act to these facts.

II.

The Petition in this Case Presents a Broader Question under Noerr Than Does Trucking Unlimited.

Throughout the proceedings in this case there has been no proof that Petitioners ever actually presented what could be properly called false nominations to the Railroad Commission for consideration in determining the monthly allowable production from the Appling Field. The procedural posture of the case, however, requires that these allegations of Respondents be taken as true. Petitioners, there-

fore, respectfully urge the Court to grant the writ so that the full scope of *Noerr* and related decisions may be vindicated and reaffirmed as applying to governmental action even when such action may be based upon falsehood or deceit. Whether the courts of appeals are to be allowed to erode the scope of *Noerr* and *Pennington* so as to destroy its application in such a situation is not before this Court in No. 1419, October Term 1970, *California Motor Transport Co.* v. *Trucking Unlimited*, in which certiorari has been granted. That case like this one involves the point of the application of the *Noerr* principle to administrative and quasi-judicial action of government but does not present the point as this case does of *Noerr* application to cases of alleged false representations to the government agency.

III.
Absence of Factual Determination of Relevant Market Precludes Fragmenting Case by Remand for Damage Determination Only.

If Respondents' efforts to sustain the Court of Appeals' fractionating of a single antitrust cause of action* into separate segments to be separately tried was not precluded by the four-year limitations ban in Section 5(b) of the Clayton Act, which it is, affirmance of a separate pipeline damage segment, remand for trial on damages only of a splintered off extraction plant segment, and remand for full and separate trial of the alleged false nominations portion would nevertheless warrant Supreme Court review for two reasons:

(1) The attempted piecemeal procedure of trying a single cause of action* in fragments, instead of on the entire

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* The case must be regarded as a single cause of action to avoid the limitations bar by relation back of amended complaints because the false nominations only were sued upon in the original complaint and the pipeline segment and the extraction plant segment were not added by amended complaints until long after expiration of the four-year bar.

evidence as to all issues of liability and damages *on the whole case at one time,* would be such a radical departure from established federal procedure as to deny petitioners a fair trial of the entire case and to engraft an abhorrent and confusing splintering doctrine into federal trial procedure.

(2) There has never been a factual determination in the case of the relevant market as to which the Section 2 monopoly finding is sought to be applied, but instead the Court of Appeals has held *as a matter of law — with no evidence to say nothing of uncontroverted evidence to support it* — that the single small Appling Gas Field in which no gas was marketed is the relevant market. Petitioners filed and presented written requests to the trial court before its instructions to the jury that a fact issue be submitted as to the identity of the relevant market or as to whether the Appling Field was the relevant market. These requests were denied and Petitioners objected and excepted to failure to submit the requested issues and to the trial court's instructing the jury as a matter of law that the Appling Field was the relevant market — again before such instructions had been given. After the instructions and after verdict the trial court decided that such instructions were erroneous and that as a matter of law the Appling Field was not a relevant market. The Court of Appeals reinstated the acknowledged error of the trial court and thereby denied Petitioners their very minimum right of a fact finding by the jury on the relevant market issue. The single cause of action and every splintered segment of it are each and all dependent upon a proper relevant market finding.

The drastic precedent that a single small gas field in which no gas is marketed is a relevant market is totally oblivious to the economic realities of the oil and gas industry, in which single oil or gas fields are typically owned and

operated by a single company out of economic and industrial necessity. This aberrant holding not only renders literally hundreds of such fields Section 2 Sherman Act monopolies but graver still has the disruptive effect on established antitrust jurisprudence of judicially establishing that a small non-market unit in any industry may be held a relevant market for Section 2 monopoly purposes as a matter of law.

Conclusion

Petitioners pray that the writ be granted on all points and that the judgment of the trial court be affirmed.

Respectfully submitted,

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JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners
Aluminum Company of America,
Crown Central Petroleum Corporation
Lavaca Pipeline Company

Of Counsel:

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Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Supplemental Brief of Petitioners Answering Respondents' Reply Brief of August 23, 1971 were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address this ..... day of September, 1971, thus serving all parties required to be served.

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JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002
Counsel for Petitioners